JUDICIAL LEGISLATION: ITS LEGITIMATE FUNCTION IN THE DEVELOPMENT OF THE COMMON LAW.

THE phrase "judicial legislation" carries on its face the notion of judicial usurpation. It is habitually used by our courts with this sense of reproach. The same disapproval is apparent when Bentham, expressing theories very different from those of the judges, designates the whole common law as "judge-made law." But if judicial legislation be understood to mean the growth of the law at the hands of the judges, — and it is in this sense that the term will here be used,— it will not do to assume that it is merely an evil. I shall endeavor to show, on the contrary, that it is a desirable, and indeed a necessary, feature of our system. The subject will be discussed in the following order: (1.) Certain questions in regard to the nature of law, and the bearing of these questions upon our topic, will be first considered. (2.) Some characteristic features of the common law will be examined, with a view to showing that growth at the hand of the judge is a necessary consequence of its methods of reasoning, its mode of dealing with cases, and the machinery by which its operations are carried on. (3.) It will then become important to observe that the same features of our system which bring about this result in the common law lead also to judicial growth in the application of statute law. (4.) These considerations will furnish a basis for certain conclusions in regard to the question of this essay, namely, the proper function of the judge in the development of the law.

I. The nature of law, a question which underlies the whole philosophy of jurisprudence, is far beyond the reach of this essay. It is, however, so connected with the subject of judicial legislation that to clear the ground for a proper understanding of the latter, notice must be taken of certain leading opinions on the deeper question. It is indeed impossible to deal intelligently with the present topic without some consideration of the terms "law" and "legislation."

For the definition of law which is generally accepted at the

present time we must look to the so-called "Analytical Jurists," of whom Bentham and Austin are the most distinguished. A law, according to Austin, is a general command issued by the sovereign power in any state to political inferiors, and enforced by a sanction. No rule, whatever its nature, is properly called a law if it lacks any of these essential features. The type of law in this sense is written statute law, the express command of the sovereign. A body of customary rules, such as the common law, is brought within the definition by the maxim that what the sovereign permits he commands. The judge who administers the common law is regarded as the sovereign's agent, with a delegated power of oblique legislation. He has authority to legislate "as properly judging," and thus to convert into law the custom, which until so recognized is, in the disrespectful language of a critic of Austin, relegated "to the limbo of positive morality."[1]

This analysis of law, the corner-stone of Austin's system of jurisprudence, has recently met with a vigorous attack from learned writers. Mr. James C. Carter, in his oration on the "Ideal and the Actual in the Law,"[2] has flatly denied that law is in any true sense a command, and maintained that it is really custom. Law, as he defines it, "consists of rules springing from the social standard of justice;" it is a "department of sociology," "one of the great facts of society itself." The necessary result of this view is that there is properly no such thing as judicial legislation.[3] By the very definition of law as something which is created by and exists in society, it cannot be made by the judge; he is merely the expert appointed to "search for" the law, and to affix to it, when discovered, his official stamp. Even the legislature does not make law in a strict sense. Its function, which is properly secondary and auxiliary to that of the judge, is to assist society in getting rid of its old customs and forming new ones. Similar ideas have been expressed[4] by Professor Hammond, of St. Louis, who rejects Austin's conception of sovereignty, and defines law as a "principle of order existing in society." The view that the judges have a

[1] Professor Hammond, notes to Blackstone, I. 119. Mr. Holland, a follower of Austin, corrects in his Elements of Jurisprudence (3d ed.), 51, what appears to be a slip in Austin's reasoning as to the point of time at which the custom must, according to his theory, become law.

[2] Delivered before the American Bar Association, August 21, 1890.

[3] The Ideal and the Actual in the Law, 7, 17.

[4] Notes to Blackstone, Vol. I. s. 2.

delegated power of legislation he regards as a confusion of the historical and the scientific aspect of the subject.

An admirable essay by Mr. T. J. Lawrence, of Cambridge, England,[1] throws light on this perplexing difference of opinion. His subject, International Law, led naturally to a consideration of the Austinian theory, for it is a necessary result of that theory that international law is strictly not law at all. The current idea of law, according to Mr. Lawrence, contains so many elements that no definition could embrace them all. For the precise definition and classification, however, which scientific investigation requires, some one element must be selected and made prominent. Just as economists select for purposes of scientific inquiry the desire to grow rich, and reject all the other motives which influence human action, so Austin rejects all the other elements in the complex conception of law, and constructs his system wholly on the basis of the force which compels obedience to its rules. The conception of law reached by this process is necessarily an abstraction. The method is scientifically correct, but its results must be incomplete, and can therefore be only approximately true. For the jurist as well as for the economist it is a logical error to forget the elements which he has laid aside. This being the method by which a scientific conception of law is reached, the question arises whether the classification on the basis of force is the most satisfactory one. For the economists this question of classification is made easy by the fact that one motive, one element in the problem, clearly predominates. If the element of force were equally predominant in the conception of law, the system of the Analytical Jurists would be as clearly correct. But Sir Henry Maine has demonstrated that Austin's notion of law is inapplicable to the more primitive communities, and Mr. Lawrence is of the opinion that though provisionally accurate for a certain stage, it becomes less applicable as society advances. Obedience to law comes more and more from a recognition of its justice and propriety, not from the fear of punishment, and the law thus becomes the "product of the stored-up wisdom of the community" rather than the command of a superior. The force which compels submission becomes less prominent as an essential element in our legal con-

[1] Essays in International Law (2d ed.), Chap. I. The basis of this essay, as the author states, is to be found in Lectures XII. and XIII. of Sir Henry Maine's "Early History of Institutions."

ceptions, while the notion of order gradually takes its place. In the ideal condition toward which civilized society is tending all men would obey the law without compulsion, and the element of force would thus disappear altogether. This development is especially brought out in a democracy, where the distinction between sovereign and subject fades away, and the force behind the law comes from the very persons whose conduct it regulates. "When," says the writer,[1] "the hitherto neglected subject of the effect of forms of government on legal conceptions comes to be carefully studied . . . it will . . . be found that democracy engenders views of law quite irreconcilable with those put forward by Austin," — a prediction which is verified in the writings of Mr. Carter and Professor Hammond.

From these views the conclusion is drawn that in rewriting the philosophy of the law, the notion of order should be substituted for that of force as a basis of classification, law being defined as a "rule of conduct actually observed among men." The fact that the rules of the municipal law are always enforced by a political superior would then be regarded merely as one attribute of that law as distinguished from other species of the wider genus. This would include international law — the rules of conduct observed among nations — and other classes of rules which, though not commands of a sovereign, satisfy the definition suggested above.[2] The same idea has been suggested by a learned writer[3] who has said that Austin's definition is valuable "rather practically than philosophically," and has asked in what respect the rule that a dress suit must be worn to a dinner-party is less a law than the Statute of Usury in New York, which juries are never asked to enforce.

It has been impossible here to do more than indicate, briefly and inadequately, the outlines of this theory. It is valuable, however, for the cautions which it suggests against the unguarded application of the doctrines either of Mr. Carter or of Austin.

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[1] Essays in International Law (2d ed.), 16.

[2] This conception of law is well illustrated by the body of customs which we call the "law merchant." Take, for example, the rule which makes the 17th section of the Statute of Frauds a dead letter in the Liverpool Exchange (1 Law Quart. Rev. 24). It is obvious enough that this is not a law in Austin's sense. Yet in the definiteness of its sanction, and in its binding force as a rule of conduct, no command of a sovereign could be more effectual.

[3] 5 American Law Review, 1.

(a) The former seems to involve a confusion between the genus and the species in the classification just indicated. Although it may be true that law in its widest sense includes all rules of conduct actually observed among men, and that Mr. Carter's thesis that law is custom is in so far correct, it cannot be denied that law in the narrower sense in which we habitually use it,[1] *i.e.*, municipal law, consists of a set of rules in which the element of force and a definite sanction are ever present and most important. Whether or not these are rules commanded by the sovereign, they are at least rules enforced by him, and those only. The difficulties which seem to have been escaped by denying that law is a command thus recur in the question, What rules does the sovereign enforce? To answer that he enforces the customs of the people, the "expressions of society in its jural relations," is to confuse the source and mainsprings of the law with the rule of law itself. That this rule proceeds in some form or other from society's sense of what is just and expedient is no justification for neglecting the medium by which this sense finds expression. It is for the latter, the rule promulgated from some recognized source, and not for the former, that the judge must "search." This is clearly shown by the fact that so far as the two are inconsistent, as, for example, in the case of a constitutional but unrighteous statute, the judge is bound by the rule, and is not at liberty to look into the conflicting custom. Such a confusion between the rule and its source — between law and ethics — would hardly have been possible in a community where the law habitually found statutory expression. (b) The analysis suggested by Mr. Lawrence has a bearing no less important on Austin's treatment of law as a command. This form of expression may, by the maxim that the sovereign commands what he permits, undeniably be made to cover all laws, since law in our sense is limited to rules enforced by the sovereign. It is probably true, moreover, that this conception applies with fair correctness to the conditions of modern society. Whether in rewriting the philosophy of the law the notion of order should be substituted for that of force, or whether Austin's classification is the better, is a question which is not for us. But it is of the first importance to perceive that Austin's theory is a development; that it is not, as its advocates seem to have thought, a "body of fixed, irrefragable truth,"

[1] In this sense, unless otherwise mentioned, it will be used in this discussion.

but is only "temporarily and provisionally accurate."[1] Sir Henry Maine has shown, with the genius which has done so much to illuminate the history of the law, that there are times and conditions of society to which the Austinian analysis is utterly inapplicable. In such communities custom is blindly followed without a thought of discussing the reasons for so doing or the consequences of disobedience. The obligation of the custom proceeds from itself, and is wholly independent of any human superior. The ruler, though often so absolute as to fill to the letter the requirements of Austin's sovereign, has no thought of changing the customs; indeed, he may never once make a law in Austin's sense.[2] Such are the village communities of the East to-day, and such, so far as observation has shown, has been the condition of primitive societies generally at one stage of their growth. In this growth the conception of the judge, as expounding the customs, preceded that of the legislator, — a circumstance which shows plainly enough the historical inaccuracy of the theory by which the judge is regarded as exercising a delegated power of legislation. It was long before the two notions of judging and legislating were clearly separated. When the ruler was appealed to in early times as a law-giver it was not to make laws, but to declare them; not to change the existing customs, but to guarantee their enforcement. The notion of legislation in our sense is essentially a modern growth, among progressive Western societies.

This inadequacy of the Austinian theory as applied to customary law has a special significance for us; for we live under a body of customary law which has come down in a stream comparatively unbroken from remote times. Modern study is revealing every day more plainly the permanence of our legal conceptions, and the great importance, so often underrated, of the Germanic basis of our law. It will not do, then, to forget that there was a period in its growth when it would have been a mere figure of speech to deal with it as the command of a sovereign. The conditions of the present time are of course very different. But even if the provisional accuracy of Austin's theory of law be conceded, the abstraction of which it is the result discards one element which must never be forgotten; *i.e.*, "the entire history of each

[1] Lawrence, 6.

[2] Such a ruler is described by Sir Henry Maine in his Early History of Institutions (3d ed.), 380.

community," the "mass of historical antecedents which determines how the sovereign shall exercise or forbear from exercising his irresistible coercive power."[1] This divorce from history is a circumstance of the highest importance. It means nothing less than rejecting the element most essential to a correct understanding of such a subject as the English law. That the Austinian identification of law with legislation should lead, among other things, to a slighting of the common law is almost inevitable. One must indeed be constantly on his guard against too literal an application of the doctrine that a law is a command. It has often been used in connection with the common law in such a way as to turn the mind from the true function of the judge, that of deciding controversies, and to confuse the process with that of issuing general commands.

Much that has been written on the subject of judicial legislation really turns on these questions of the nature of law, and is made clear by an understanding of the different theories on the latter subject. When Professor Hammond, for example, maintains that the judges merely declare the law, and denies that they have the delegated authority to make it which Austin attributes to them, he is only restating in another form his proposition that law is not a command, but a principle of order. He expressly admits the growth of law by judicial decision when he says that in a historical, as distinguished from a scientific, sense the judges do legislate. On the subject of judicial legislation in our sense the difference of opinion between him and Austin is thus more apparent than real. They give the process different names, but they agree as to its existence.

Turning from these questions of the nature of law in its broadest sense, certain points in regard to law in our more restricted sense may now be assumed. It is a body of rules of some kind; those rules which are enforced by the sovereign power in a state, and those only. The source and support of these rules, in a civilized and self-governing community, must be justice; that is to say, the opinion of the community as to what is right and expedient. They are the medium by which the moral sense of society finds expression, the conservative force by which the majority registers its conclusions and enforces them upon a recalcitrant minority. Since we deal with those rules only which

[1] Maine, Early Hist. Inst. (3d ed.) 360.

are enforced by the sovereign, it may be practically convenient to regard them as the sovereign's commands; but in using this form of expression the cautions which have been suggested must not be forgotten. The question of this essay resolves itself, then, into this: How far is it the proper function of the judge in our system to shape and develop the rules which constitute the municipal law?

II. (a) This question calls first for an examination of certain characteristic features of the English law. The common law, strictly so called, must be taken as a type, though it will be desirable for purposes of comparison to refer to the process by which statute law is applied. This limitation of the discussion to the common law makes it necessary to lay aside one subject of which notice must here be taken, namely, the great system administered by courts of equity. Growing up, not as a separate system of law, but merely as another mode of administering the common law, and in this way of remedying its defects, it has by its operation given rise to a great body of rights, derivative in their nature and based on its peculiar remedies.[1] If our object were a history of judicial legislation in the past, nothing would deserve more attention than the remarkable borrowing of equitable principles which for one cause or another has gone on in courts of law. To estimate the importance of these additions, without which our law would be a very different thing from what it is, it is only necessary to consider, as a single instance, the enormous reach of the purely equitable doctrine of estoppel. At the present time, however, the principles of equity are comparatively fixed and definite, and the two systems of law and equity are to a great extent administered by the same courts and merged into one complete whole. Therefore, though their so-called fusion makes it none the less necessary to remember the abiding distinctions between the two systems,[2] much that is here said will have an application to both.

Coming then to the common law of England and the method by which it decides a case, it is important to observe at the outset how the process presents itself to the judges, the persons in whose control it lies. Their testimony is unanimous. From the earliest times to the present day they have agreed in what Austin has

[1] See Professor Langdell in 1 Harv. L. Rev. 55.

[2] See 4 Harv. L. Rev. 394.

stigmatized as the "childish fiction"[1] that they were "not delegated to pronounce a new law, but to maintain and expound the old one."[2] This idea of applying the existing law, a body of "statutes worn out by time," as Chief Justice Willes called the common law,[3] appears everywhere in our reports.[4] The judges constantly stop short of the most tempting equity[5] with the declaration that they are to declare, not to make, the rule of law. Nothing could be more radically different from this attitude than the position of judges sent out to decide controversies according to their own judgment in each particular case, the mere *abitrium boni viri*.[6] Even such a declaration as that of the French code, which forbids the judges, under a penalty, to let any case fail for lack of law,[7] would be incomprehensible to an English judge, if intended to mean anything more than a just and wise application of the common law, a process which he regards as declaring the law. The views of the judges on this subject must not, it is true, be accepted too absolutely, for a striking feature of the common law has been the steady development along its characteristic lines, unaffected by the theories of its expounders. In case of any conflict between theory and the traditional methods, the courts have been able conveniently to slough the former, and have proceeded as their predecessors did before them.[8] Only by a study

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1 "The childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges." Austin's Jurisprudence (4th ed.), 2, 655.

2 Blackstone's Coms., I. 69.

3 2 Wils. 348. See Christian's notes to Blackstone, s. 3.

4 The common-law theory is stated and expounded by Chief Justice Shaw in Norway Plains Co. *v.* B. & M. R.R. Co., 1 Gray, 263, 267, and Com. *v.* Temple, 14 Gray, 69, 74.

5 See Hammond's notes to Blackstone, I. 216.

6 Such appears to have been the situation in certain temporary courts created after the Great Fire of London by St. 18–19 Car. II. c. 8, s. 25.

7 Code Civ., art. 4; see Markby's Elements of Law (3d ed.), s. 26.

8 So Lord Chief Justice Keble said the law of England was "the very consequence of the very decalogue itself," "as really and truly the law of God as any Scripture phrase," and that "whatever was not consonant to the law of God in Scripture" was "not the law of England, but the error of the party which did pronounce it." (5 How. St. Tr. 172.) Yet he would have had no difficulty in denying that it was slander to accuse a pure woman of unchastity; and if the obligee of a bond paid before the day had contrived to regain the instrument, the Chief Justice (or at least his predecessors) would have been likely to resent the interference of equity to prevent a second payment. Indeed, a "serjeant of the law of England" is represented in the 16th century as saying of this very form of equitable relief: "And so me seemeth that it is not only against the

of the cases themselves can an exact analysis of the methods of the common law be reached. But in the inquiry what the English system does, as distinguished from what other systems do, or what might conceivably be done, the conception of the judicial function which presents itself to the judge himself is of the first importance.

The distinguishing feature of the English law is the binding authority which it attributes to a former decision. This respect for precedent, in which our system is unique,[1] has much importance in the present inquiry. It is the circumstance, together with the absence of codification, which gives rise to the cardinal feature of our law, *i. e.*, that it is bound up with the facts of particular cases. It is this feature which furnishes a clew to the characteristic processes of the common law.[2] The method by which a case is decided may be briefly stated as follows: After the necessary analysis of the facts, the first question for the court is whether the same facts have been passed on before. If so, the inquiry is closed.[3] This case falls within the rule of the earlier

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law of the realm and against the law of reason, *but also against the law of God.*" (Doct. & Stud., appendix.)

[1] Markby, Elements of Law (3d ed.), s. 92. So Sir Henry Maine says (Early Hist. Inst., 3d ed., 47): "Nowhere is anything like the same dignity as with us attributed to a decided 'case,' and I have found it difficult to make foreign lawyers understand why their English brethren should bow so implicitly to what Frenchmen term the 'jurisprudence' of a particular tribunal."

[2] Markby (3d ed.), s. 98, couples with this feature of the common law its *ex post facto* quality, and regards these two as the most significant among the several properties of "judiciary law" enumerated by Austin. It may be doubted, however, whether Markby in saying this, does not overrate the importance of the latter quality as a distinction between the common law and statute law. It seems to be one of form rather than substance. It is true that with a new state of facts it is in a sense impossible to say, under our system, that the law exists before the case is decided. Yet if principles exist which make it certain how the case will be decided, it is the same, from a practical point of view, as if the law previously existed. Statute law, on the other hand, exists in form before the determination of a case; yet in the event, which too often occurs, of a well-founded uncertainty what construction will be put upon the statute, its substantial *ex post facto* quality when the case is decided is plain.

[3] *I. e.*, this is so in a system of case law carried to its strict logical extreme, of which the English theory in regard to the decisions of the House of Lords is an instructive instance (see Blackburn, J., in 1 Q. B. D. 515, 528; Pollock, Science of Case Law, Essays in Jurisprudence, 237). The right to overrule former cases does not materially alter the theory. The later court may, as in England, be required to accept the error on these facts, or may, perhaps more rationally, be allowed to disregard it as an erroneous application of the sources from which the earlier tribunal reasoned, and to fall back on those sources themselves.

one, and is thus disposed of. If the present facts do not directly fall within any case, or any hard-and-fast rule already settled, the first inquiry of the judge is for decided cases similar to this. Instances are produced, each showing the law on a particular state of facts, and presenting an analogy to the case in hand more or less direct. These cases are scrutinized, classified, distinguished; the wider principles which they illustrate, and which are claimed by the contending parties to include the present case, are determined and tested by a comparison with other branches of the law; and thus a decision is finally reached. Paley has given the following description of the process: "It is by the urging of the different analogies that the contention of the bar is carried on; and it is in the comparison, adjustment, and reconciliation of them with one another, in the discerning of such distinctions, and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger, that the sagacity and wisdom of the court are exercised." [1] Austin quotes this passage, and separates the process into that of extracting the law, the *ratio decidendi*, from the cases, and then applying it. But Paley's statement is valuable as calling attention to the frequent failure of the common-law judges to distinguish between these two processes. Often, as has been well said, they do not extract a rule and then apply it, but determine the rule *by applying it*.[2] Mr. Pollock, in an ingenious essay on the "Science of Case Law," [3] has compared the reasoning of a system of case law to the method of a natural science, and has pointed out how the fundamental assumption of the uniformity of law is as necessary in the one as that of nature is in the other. Without this assumption the argument from precedent means nothing; unless the former case was decided under the same law, it is not a precedent at all.[4] Yet as the natural science grows, expands, develops, with each new experiment, so the decision in each case is a step in the growth of the law, a new *datum* for future reasoning.[5] As this

[1] Paley, Moral Philosophy, II. 259.

[2] Markby, Elements of Law (3d ed.), s. 100. Maine seems to have the same point in mind when he says (Ancient Law, 9th ed., 32) that we are "not in the habit of throwing into precise language the legal formulas which we derive from the precedents."

[3] Essays in Jurisprudence, 237.

[4] Hammond, notes to Blackstone, I. 222.

[5] Maine, Ancient Law (9th ed.), 31–2.

process goes on, fought over at every step by trained counsel and scrutinized by the court, there is a constant shaping of the law. A principle which lay vaguely in the cases takes a more definite form, its boundaries on the one side and the other are determined, and it becomes eventually as fixed and precise as a statutory enactment.

(*b*) To illustrate these processes of the common law, and the results to which they lead, it will now be useful to examine somewhat in detail one or two representative cases.

In the famous case of Fletcher *v.* Rylands,[1] the defendant had collected large quantities of water in a reservoir on his land. He had employed a competent contractor to make the reservoir, and was himself guilty of no negligence; how far he was responsible for the contractor's negligence became immaterial to the decision. But in consequence of some old workings in the defendant's land, of the presence of which he was ignorant, the support of the reservoir gave way, and the water, escaping underground through these workings, flooded the plaintiff's mine. For the damage thus caused the plaintiff brought suit. The question was thus raised whether the defendant was bound to keep the water in at his peril, or merely to use due care. There were the competing analogies on the one side of the absolute liability imposed by the common law for damage done by trespassing cattle, by fire, by escaping filth,[2] or savage beasts; on the other, of the large class of cases where a defendant who drives along the street,[3] or handles a gun,[4] or raises a barrel into his warehouse,[5] is held responsible only for actual prudence. The argument for the contending parties dealt with principles. For the plaintiff it was urged that the only quality common to cattle, fire, and filth was that of substances collected on the land of one man which might, by escaping, damage his neighbor. The specific rules laid down by these cases were therefore to be regarded as illustrations of a general principle, applying to water as well as to cattle or filth, that a person who brought on his land something which, however harmless while there, would naturally do mischief if it escaped, must

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[1] 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330.
[2] Tenant *v.* Goldwin, 2 Lord Raym. 1089.
[3] Hammack *v.* White, 11 C. B. N. S. 588.
[4] Stanley *v.* Powell, 39 W. R. 76.
[5] Byrne *v.* Boadle, 2 H. & C. 722.

keep it in at his peril. The defendant relied on the conflicting principle that in case of a duty imposed by law (as distinguished from one created by the agreement of the parties), nothing more than actual prudence was required, and dealt with the cases relied on by the plaintiff as isolated exceptions having no bearing on the case in hand. This view was adopted by the Court of Exchequer, Bramwell, B., dissenting. But this judgment was reversed in the Exchequer Chamber. Blackburn, J., in an elaborate opinion, which is an excellent example of common-law reasoning, indorsed the principle suggested by the plaintiff, which, he said, applied equally, "whether the thing be beasts, or water, or filth, or stenches." He thus rejected the broad principle contended for by the defendant; and he distinguished the cases of collision on the highway, and the like, on the ground that there the plaintiff, by entering into a situation where the chance of accident might reasonably be foreseen, took the risk upon himself. The House of Lords affirmed the judgment of the Exchequer Chamber and expressed particular approval of the opinion of Blackburn, J. Lord Cairns suggested as the test the question whether the use of the defendant's land was "natural" or "non-natural," the present case being an illustration of the latter class.

The noticeable feature of this course of reasoning is the scrutiny and comparison of previous cases, and the extraction from them of a principle within which this case is held to come. The process thus takes on the form of declaring the existing law, of applying the principle, like a statutory rule, to the facts. But these "principles" which are under discussion, and of which the cases are regarded as specific applications, are clearly not in all respects like definite rules of law. They differ from such rules in their scope and precision, approaching in this respect those general maxims or ground rules by which the whole reasoning process is carried on.[1] They are rather to be regarded as guides in drawing analogies, and their precise limits are in dispute. Moreover, a statute necessarily precedes its application; here the process is reversed. The cases came first, the statement of the principle afterward, as something extracted from them. They cannot strictly be called applications, or, at any rate, conscious applications, of the princi-

[1] Maine has remarked in his Village Communities, 335, on peculiarities in the use of the word "principle." As a matter of fact, we use the word in various senses, and it is impossible to tie it down to any one meaning.

ple. Some of them, at least, were probably decided without any thought of it. The law in regard to cattle goes back to the earliest times. Whatever its historical origin,[1] it certainly antedates modern methods and conceptions. And so the liability for fire, whenever it was settled, was probably not reached by the application of any such general principle as that laid down by the court in Fletcher *v.* Rylands. As to these two articles, however, cattle and fire, the law is fixed, and to this extent we have settled rules of law. Tenant *v.* Goldwin adds a rule as to filth, and there begins to be a group of cases which suggests some connecting link. Still there can hardly be said to be any rule of law yet in existence within which Fletcher *v.* Rylands falls. Strictly regarded, that case merely draws an analogy from the previous ones. The actual decision has, in a way, a double effect. Besides adding another precise rule, a judicial declaration of the legal consequences of collecting water, it has the further effect of binding together the class of cases to which it belongs, of shaping and refining their principle, and at the same time limiting the conflicting principle. The liability for cattle, originally a rule by itself, has passed over into an instance of this broader principle. In many respects, however, the precise outlines of the principle are still left vague and undetermined. What is the test, it may be asked, of a substance which comes within it? Is it limited to things which have a tendency to escape,[2] or would it include anything likely to do damage if it escape[3] — a pile of boards, for example? If the question is put in the form suggested by Lord Cairns, what is the test of a "non-natural use"? Does the principle apply only to adjoining landowners?[4] These and many other questions are left open by Fletcher *v.* Rylands, and for the most part remain unanswered at the present time.[5] In this condition the subject is likely to remain until a succession of later cases, falling on one side or

[1] See Holmes, Common Law, Lecture I.

[2] Wilson *v.* Newberry, L. R. 7 Q. B. 31, 33; Bigelow, Torts, 258.

[3] L. R. 1 Ex. p. 279.

[4] Martin, B., in Carstairs *v.* Taylor, L. R. 6 Ex. 217; see Pollock, Torts (1st ed.), 399.

[5] The later English cases relate mostly to water. Crowhurst *v.* Burial Board, 4 Ex. D. 5, applies the doctrine to a poisonous yew-tree projecting over the plaintiff's land; but as Mr. Pollock points out (Torts, 1st ed., 400), this may be brought under the head of nuisance. In Massachusetts the principle has been applied to snow on a roof. Shipley *v.* Associates, 101 Mass. 251. In some States Fletcher *v.* Rylands has been rejected altogether. Losee *v.* Buchanan, 51 N. Y. 476; Brown *v.* Collins, 53 N. H. 442.

the other of the line, has brought out the precise limits of the rule.[1]

Fletcher *v.* Rylands shows one stage in the growth of a rule of law by means of decided cases. An example may now be taken of a more advanced stage in the process, where the result of a series of decisions, gradually grouped and classified, is a definite rule of law accepted and enforced by the courts in all respects like a legislative enactment.

The law of distress, an ancient branch of the common law, gave the landlord a lien upon any chattels found upon the premises, even though they were the property of a third person. From early times, however, it was recognized that this rule was not universal. For one reason or another, certain goods were held to be privileged from distress. The early decisions probably proceeded upon simple grounds. "This would tend to a breach of the peace;" "it would discourage trade;" such arguments as these were the controlling considerations. The cases as they multiplied fell naturally into certain groups, and in 1744 Chief Justice Willes, in deciding that a stocking-frame was exempt from distress,[2] as an instrument of trade, enumerated five classes of articles privileged, either conditionally or absolutely. Among the latter were "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed, in the way of his trade or employ."[3] In the case of Muspratt *v.* Gregory,[4] nearly one

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[1] In one particular, however, this process has already been performed by a series of later decisions. Fletcher *v.* Rylands expressly left open the question what circumstances would excuse the defendant. It has since been held that the act of God is an excuse (Nichols *v.* Marsland, 2 Ex. D. 1); so of the act of a third person (Box *v.* Jubb, 4 Ex. D. 76); the fact that the water was collected in the performance of a public duty (Madras Co. *v.* Zemindar, L. R. 1 Ind. App. 364); or for the joint benefit of the plaintiff and the defendant (Carstairs *v.* Taylor, L. R. 6 Ex. 217); and it has even been suggested (Carstairs *v.* Taylor) that the defendant was not liable for an escape caused by rats. These cases leave a very limited field of operations for the principle of Fletcher *v.* Rylands. Moreover the doctrine, which had an important influence on the decision (see Lord Cranworth's opinion in the House of Lords), that a man who sets a force in motion must answer at his peril for the consequences, has lately been repudiated in England (Stanley *v.* Powell, 39 W. R. 76), as it was long ago in this country. It is not impossible that Fletcher *v.* Rylands may yet come to be regarded as a somewhat illogical appendage to the class of cases where, though the want of due care is a necessary element of liability, the mere occurrence of the accident is held to raise a presumption of negligence.

[2] Simpson *v.* Hartopp, Willes, 512.

[3] This was quoted in substance from the earlier case of Gisbourn *v.* Hurst, 1 Salk. 250.

[4] 1 M. & W. 633; 3 ib. 677.

hundred years later, the defendant in distraining upon his tenant, a public manufacturer and seller of salt, seized the plaintiff's boat, which was lying in a canal on the premises waiting to be loaded. It was usual for the tenant's customers to send their own boats in this way. In regard to the defendant's right to seize this boat the Court of Exchequer was divided. Parke, B., made an elaborate review of the cases, beginning in the time of Edward IV., which illustrated Willes's rule about things "delivered in the way of trade," and came to the conclusion that these rested on the principle of public welfare that trade must not be unduly restricted. The "principle of the rule of exemption" covered all goods placed in a trader's hands to give the owner the full benefit of the trade as it was actually carried on. He therefore held these goods to be privileged, thinking it "contrary to the established mode of judicial decision to include one class of goods which fall within the mischief, and exclude another, merely because the case had not risen." But the majority of the court, and the Exchequer Chamber on appeal, held otherwise. *Prima facie*, they said, the goods were liable to distress, such being the general rule. To exempt them they must be brought within some recognized class of exceptions; and in the class then under discussion every recorded case related to a trade which actually consisted in dealing with other men's goods. The privilege would therefore be carried too far by Baron Parke's principle, and this boat, not being delivered to the tenant to be itself worked on, fell within the rule, not within the exceptions. Having thus interpreted the cases, the court declined to consider whether Baron Parke's view was more expedient. Lord Abinger professed a reluctance to trust his own judgment on that subject as a basis for making rules or engrafting exceptions. Public convenience might some day require that *all* goods should be privileged from distress, just as a German author had suggested settling the Irish question by holding every tenant to have an absolute right to the land. Cases perfectly new, he said, to which the law furnished no analogy, must, "by the law of England, and indeed of all countries," be "determined as they arise, by the good sense of the judges." But this had no application to the present case, which must be governed by the rules and principles of the existing law.

The last stage in the gradual stiffening which this rule has undergone may be seen in Clarke *v.* Milwall Dock Co.[1] No

[1] 17 Q. B. D. 494.

statute could be more strictly construed than the rule of exemption as applied in that case. A ship which the tenant was building for the plaintiff was distrained by the defendant. The title had passed, according to the peculiar rule of the English law in regard to ships, while the building was going on. The ship was thus the plaintiff's property; it was being worked on by the tenant, whose trade consisted in working upon other men's goods; and if the plaintiff had only delivered it to the tenant, the exact terms of the rule acted on in Muspratt *v.* Gregory would have been satisfied. It was urged that this lack of a delivery was immaterial. But the Lord Chancellor replied that he was not at liberty to inquire whether one part of the rule was more essential than another; he was limited to its precise terms. He therefore held, though expressing regret at the result, that the absence of a delivery was fatal to the plaintiff's claim of exemption. Lord Esher, in concurring, said the exceptions laid down in Sampson *v.* Hartopp were "stated in the form of rules, not principles, and that distinction was upheld in Muspratt *v.* Gregory, where the court was asked to find that they were principles, but refused to do so."

In the process of "judicial codification"[1] which these cases have been used to illustrate, the order of development is seen to be, first, the cases; then the rule, growing up by successive decisions and taking on a definite shape; then the application of that rule, like a statute, to further cases. This development, however, is very gradual. The process of working out analogies by a principle (to adopt Lord Esher's distinction between "principles" and "rules"), and that of applying the final judge-made rule, shade into one another by imperceptible degrees, and it may be impossible to say at any given time whether a decision is new law, or is merely the application of an existing rule. Different branches of the law reach the final stage at very different periods, according to the lines in which society develops. As the pursuits and interests of men turn in one direction, the cases on that subject become numerous, the analogies multiply, and the law passes into a comparatively rigid condition. This happened at an early time to the English law of real property in some branches, and its growth has therefore required the aid of the legislature to an unusual degree. On other subjects we are at the present time passing

[1] Maine, Village Communities, 368.

through the earlier stages of the process. In the law of corporations, for example, the courts are now engaged in examining the essential features of these important instruments of modern civilization, and in testing the various principles and analogies offered by the cases, and have yet to reach the situation where definite and comprehensive rules emerge from the chaos.

The instances which have been considered serve to illustrate the method of reasoning by which a case is decided under our system, and the effect of the decision when made. That the process involves the development and expansion of the law at the hands of the judges is plain enough. It must needs be so because of two circumstances, — the effect which we give to precedent, and the infinite variety of facts which present themselves. The law at any given time is limited to rules actually prescribed or enforced by the sovereign.[1] As new states of fact constantly come up for determination, and the decision once given becomes in turn a precedent for future reasoning, it is impossible that the law should not grow;[2] and it is thus that the great body of our law has developed. It is highly important, however, to distinguish between the result and the process by which it is reached, and thus to avoid the errors of those who, looking only at the former, conclude that the judge under a system of case law is a mere subordinate legislator of a peculiar kind. In one sense it is true that the judge makes law; but this is because of the effect which our system gives to his decision, an effect which is equally given (and the consequences of this are important) to his decision in apply-

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[1] So in Y. B. 33 Hen. 6, 7, 23, Prisot, C. J., replies to the argument that a certain matter is settled by use, and so is a "positive law:" "that is not so; for there cannot be a positive law except such as is adjudged or made by statute, and here that is not the case."

[2] This is clearly explained in Maine, Ancient Law (9th ed.), 31–3. Compare also the remarks of Lord Esher (then Sir W. B. Brett) before the committee appointed by the House of Commons, in 1876, in regard to the liability of the employer for injuries to servants: "The judges have no right to make law, and in general they do not suppose they are making law. . . . What [they] may do and must do . . . is to apply an admitted principle of law to the new combinations of fact which arise from day to day; and it would be impossible that they could otherwise administer the law, for anybody who has been conversant with the law knows that new combinations of fact, which have never been brought before courts before, are brought before them almost from day to day." These observations were made with special reference to the rule that a master is not liable for injuries to a servant caused by the negligence of a fellow-servant. Members of the committee had suggested that it was undesirable that rules of such importance should be introduced by judicial decision.

ing a statute. In another sense it is equally true to say with Blackstone that he is merely declaring the existing law. The process in which he is engaged is that of deciding a case, a process which antedates not merely legislation proper, but the conception of law itself. This decision is reached by a course of reasoning from existing *data* by which, if carried out with entire strictness, he would be as closely limited as if dealing with a statute. The process of dealing with statute law will be referred to later on: what it is important to observe at this point is the growth which necessarily attends the ordinary administration of that body of "written case-law" [1] which we know as the "common law."[2]

(c) This growth of law through its application is neatly brought out by another class of cases, which deal with the functions of the court and jury. To the institution of the jury are due many peculiarities of our system, among others its sharp division between law and fact; and when the question is one of drawing the precise line between these two things, there is an excellent opportunity of observing how matter is constantly carried over from one side of that line to the other. Take, for example, the important class of actions for negligence. The standard in those cases

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[1] See Maine, Ancient Law (9th ed.), 13, 14, where the inaccuracy of the expression "unwritten law" is pointed out.

[2] One important source of judicial legislation which is peculiar to the common law must be noticed in passing. In considering the growth which must *necessarily* result from the application of the law to facts, it has been assumed that the reasoning process under discussion is strictly and logically carried out. But to make this assumption is to look at only one side of the matter. The characteristic method of the common law is, as we have seen, to work along from case to case, dealing with each one as it arises, and disclaiming any intention of framing a general rule. "However it may be in other cases," the court will say, "on these facts the law is clear." It is common to see extremes at which the law is clear, while the line at which they divide remains obscure until determined by the gradual convergence of the cases. By the slow course of decision just so much law is developed as society requires, and no more; and later generations are left free to fill in the gaps in accordance with their own notions, as little hampered as may be by those of an earlier age. In the process of reconciling and adjusting the authorities, and extracting from them the principle for which they stand, there is a constant tendency to mould it into a form which corresponds with the later conceptions of justice and expediency, and which, though consistent with the actual result of the earlier cases, may be quite foreign to the ideas of those who decided them. The growth of the law, as it is sometimes said, is rational rather than logical. This so-called "flexibility" of the common law is most important, and goes far to explain the success with which it has adapted itself to changing conditions of society. The famous case of Reg. *v.* Jackson, 1891, 1 Q. B. 671, denying the husband's right of physical restraint over his wife, is a good instance of this infusion into the law of ideas which would have found little favor with the judges a century ago.

is the broad test of reasonableness, to which the courts turn in any situation for which the parties or the law have failed to provide more specifically. The jury is given the standard of the reasonable man; it is for them to say whether under all the circumstances that standard has been complied with. But behind this question, which is purely for the jury, there is always the judicial question whether the jury itself has kept within the bounds of reason. This is a mere question of fact, but it is one which the court must answer as a part of its general duty of supervising the proceedings in court and regulating the action of the jury. Often — in certain classes of cases only too often — it becomes the duty of the court to say that the jury has exceeded its bounds, and to declare that the plaintiff or defendant, as the case may be, cannot rationally be held to have performed his legal duty. With every such declaration that the acts in question are, as the phrase is, not merely evidence of negligence, but negligence *per se*, the legal standard of prudence is to some extent fixed and defined, and the field of the jury is correspondingly narrowed. The broad rule requiring reasonable care is in so far supplanted by the specific rule that the passenger in a railway train must not ride with his elbow out of the window,[1] or remain on the step of the car if there is standing-room inside,[2] or board a slowly moving train if there is an obstruction near by[3] which would make a misstep dangerous. It is true that the binding effect of such a decision is limited to the precise facts of the case, a combination which is not likely to be exactly repeated. But a later case may well contain all its essential features, and so fall within the rule which it lays down. And the process may go farther than this. If in a succession of similar cases the court finds itself repeatedly compelled to set aside the verdicts of juries, it may naturally end by laying down a general rule to dispose of them all. Such are the cases in Pennsylvania which have resulted in the enunciation of a hard-and-fast rule requiring all persons to stop, look, and listen at a railway crossing.[4] The question for the jury is no longer, "Did

[1] Todd *v.* O. C. R. Co., 7 Allen, 207. More correctly, perhaps, beyond the outside line of the car. Georgia Co. *v.* Underwood, 8 So. Rep. 116 (Ala., 1890).

[2] Quinn *v.* Ill. Central R. Co., 51 Ill. 495.

[3] Hunter *v.* Cooperstown R. Co., 126 N. Y. 18.

[4] See R.R. Co. *v.* Beale, 73 Pa. 504. In Penn. R. Co. *v.* Aiken, 130 Pa. 380, the rule was said to be "not a rule of evidence, but a rule of law, peremptory, absolute, and unbending;" and in Greenwood *v.* Phil. R. Co., 124 Pa. 572, it was applied to a hose-carriage on its way to a fire.

the plaintiff use due care?" but "Did he stop, look, and listen?" It has been objected that although the omission to look and listen may in a particular case be inconsistent with due care, and so require the setting aside of a verdict, it is a very different thing to declare that it must always be so; [1] and the Pennsylvania doctrine has been denied in many States.[2] But this doctrine, though perhaps an extreme illustration, is typical of the process as it is going on in every jurisdiction; [3] and it comes from a court which vigorously asserts the "time-honored rule," that the court must not invade the province of the jury in deciding questions of negligence.[4]

Closely connected with this subject is the growth of rules of presumption, of one class of which Austin has said that "they are resorted to by the courts as a means of legislating indirectly." [5] These rules, in regard to the true nature of which there has been much confusion, have been accurately described as *prima facie* rules of law, operating upon certain specified facts, their effect being to say that when x is shown, *and no more*, it is to be taken as equal to y.[6] The constant recurrence of similar states of fact, handled by the jury under the supervision of the court, leads to the growth of these *prima facie* rules, just as it gives rise to absolute rules fixing the legal standard of negligence, etc. Such and such facts, it is held, are sufficient to make a case for the plaintiff, and to shift the burden of proof. In the absence of further evidence a conversion or a sale may be taken as proved. Thus mere matter of evidence passes over into a rule of presumption. It would be easy to multiply instances of such rules from every branch of the law. A well-known example is found in the law of prescription, which shows not only the growth of the judicial rule as to when an origin beyond the time of legal memory would be presumed, but also the further step (a strong instance of judicial legislation) by which

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[1] It may perhaps fairly be answered that as a practical matter the benefit of the Pennsylvania rule in ninety-nine cases more than makes up for the hundredth case in which it works injustice to the plaintiff.

[2] See, for example, Terre Haute R. Co. *v.* Voelker, 129 Ill. 540.

[3] Mr. Justice Holmes in his Common Law, Lecture III., comments on this process, which he regards as a resuming by the court of a function, its own rather than an encroachment on the sphere of the jury. An encroachment in the sense of an improper, or even an unnecessary, extension it certainly is not.

[4] R.R. Co. *v.* Jones, 128 Pa. 308.

[5] Austin's Jurisprudence (4th ed.), 509.

[6] Hawkins, Wills, preface; 3 Harv. Law Rev. 141, 148.

the rule of presumption passed over through the fiction of a lost grant into an absolute rule of law.[1]

This general head, the action of the judge in presiding over the jury, in laying down rules of court, and the like, has a far more important connection with the growth of the law than has generally been realized. To it whole topics in our law owe their very existence. The law of evidence, for example, a branch peculiar to our system, would never have developed but for the jury. It had its origin in great part, as historical investigation shows, in mere rules of court based on considerations of rough sense and practical convenience, — "that one who wished to produce a witness must get a good one," — "that if J. S. had anything to tell, he must tell it in person," and the like. To such simple beginnings we owe rules in which later writers have sought to find the expression of theories of morality or systems of logic. So the law of damages, which to-day assumes such large proportions, has been largely the product of the last two generations. A century ago the amount of damages was a question resting almost exclusively with the jury; but as time went on the regulation of the jury's action in this particular became a necessity. From this supervision over excessive or inadequate verdicts, which the court has exercised in its duty of keeping the subordinate tribunal within the bounds of reason, arose a set of rules based simply on justice and common sense, and from these in turn has developed what is now a complex and elaborate system.

III. (a) Up to this point we have considered the common law, and the growth which is necessarily involved in the application of it. There remains the important question whether this sort of growth is confined to the common law. Bentham thought it altogether foreign to statute law. He regarded "judge made law" as an unmixed evil, which was to be entirely cut off by a perfect code. If the rule of law was once obtained the whole problem, as it presented itself to him, was answered. He seems to have thought of the facts as lying neatly classified, waiting for the law to be applied. The application was a kind of mechanical process so simple that it could be dismissed from consideration.[2] The same idea

[1] See Angus *v.* Dalton, 6 App. Cas. 740; 3 Harv. L. Rev. 183. In an article in 3 Harv. L. Rev. 141, other instances are given of this stiffening of presumptions into hard-and-fast rules, and also of the converse process by which an old rule sometimes "fades away" into mere evidence and matter of fact.

[2] Compare Markby, Elements of Law (3d ed.), 26.

appears in an interesting essay by Sir Samuel Romilly,[1] in the course of which he ridicules the notion that Paley's competition of analogies has any application to statute law.[2]

It is true that in form statute law appears to preclude anything like judicial legislation. The law already exists. All that the judge has to do is, first, to define its terms, and then to apply them to the facts in hand. Yet the difference between this process and that of dealing with case law is more one of form than substance, and though its field may be more limited and its presence less conspicuous, the same judicial development is believed to be a necessary result. This is due to the same causes of growth which we have seen in the common law: first, to the peculiar features of our system, such as the effect which it gives to a decision and the function of the court in dealing with the jury; second (and this was the point which Bentham overlooked), to the true nature of the reasoning process necessarily involved in applying *any* law to facts. The facts presented by cases are not cast in forms. The combinations are infinitely various, and the question of classification, as in every branch of scientific inquiry, is a relative one. According as you are dealing with one or another of their characteristics, the same facts may be regarded as x or y. There is thus the same "competition of analogies" as in case law, the same conflict of statutory rules as of judicial principles. One statute, for example, may prescribe a rule for innkeepers, another for carriers. A new kind of person may then appear who resembles in some respects a carrier, in others an innkeeper; and it becomes the duty of the court to say to which class he belongs.[3] This being so, the judicial declaration, which our system treats as a binding precedent, that the statutory rule applies to fact A, does not apply to A plus B, but does again when C is added, has, as in the common law, the effect of shaping and moulding the rule. A set of subsidiary rules, absolute or presumptive, grows up to determine what facts fall within its different terms. By the ramification of these minor rules, which are in turn adjusted and consolidated, the original law, couched in general terms, is, within its limited sphere, restricted

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[1] 29 Edinburgh Review, 217.

[2] The error of this passage is pointed out in 2 Austin's Jurisprudence (4th ed.), 653.

[3] See the case of the sleeping-car, *infra*. The bicycle, the electric car, and many other modern inventions might be used to illustrate the same point.

or extended. And this involves the result of substantial development and growth.[1]

This point may be illustrated by the modern cases which deal with the question, on which there has been a difference of opinion,[2] whether a sleeping-car company is to be held to the liability of an innkeeper. The question of these cases would be precisely the same whether they arose in a code State or under the common law. The process would in either event be that of defining an inn, and of ascertaining whether a sleeping-car had the essential attributes of an inn, as the term was used by those who laid down the rule.[3] Yet the result, the judicial declaration that sleeping-car companies are or are not liable as insurers, has in either event the practical effect of judicial legislation in our sense. A rule has been laid down which regulates the rights and duties of a class of things which were not in existence when the law about innkeepers arose. To say that there was at that time a rule of law dealing with sleeping-cars would be to speak in a merely figurative sense. It could as truly be said that the law of the electric telegraph or the railway existed in the seventeenth century.

It would be easy to give instances of exceptions read bodily into statutes by judicial construction. The fictions by which the old lawyers evaded the Statute de Donis; the doctrine that a part performance takes a case out of the Statute of Frauds,

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[1] There is a suggestive passage in Mill's Logic which points to the similarity in substance, in spite of the different form, of the reasoning in case law and in statute law. In a famous chapter the author points out how all syllogistic reasoning involves in form a *petitio principii*, and really rests on a process of induction, the syllogism being merely the final step in the process, the memorandum by which the result of previous inductions is registered. "This view of the functions of the syllogism," he adds, "is confirmed by the consideration of precisely those cases which might be expected to be least favorable to it, namely, those in which ratiocination is independent of any previous induction. . . . In these cases [the general commands of statute law] the generalities are the original data, and the particulars are elicited from them by a process which correctly resolves itself into a series of syllogisms. The real nature, however, of the supposed deductive process is evident enough. The only point to be determined is . . . whether the legislator intended his command to apply to the present case, among others, or not. This is ascertained by examining whether the case possesses the marks by which . . . the cases . . . meant . . . may be known. . . . The operation is not a process of inference, but a process of interpretation." (Mill's Logic, 8th ed., 146–7.)

[2] See Blum *v.* So. P. P. C. Co., 1 Flippin (U. S. Dist. Ct.), 500; P. P. C. Co. *v.* Lowe, 28 Neb. 239; 20 Am. L. Rev. 159.

[3] The fact that sleeping-cars are modern inventions would not necessarily lead to a negative answer, since the original rule did not refer merely to inns then in existence, or to such inns as precisely resembled those.

or a later promise waives the Statute of Limitations; the rule which reads a condition into the mind of a testator, and says in certain cases that a will destroyed under a misapprehension is not destroyed; the proposition that a legatee may by a murder revoke the will,[1] — alike illustrate the fact that courts will not refuse to supply gaps which they conceive to have escaped the eye of the legislator. The remark attributed to Baron Martin, "Never mind the act of Parliament; take it away; the man who drew that act knew nothing about the law of England,"[2] is only the bolder statement of a doctrine upon which courts have more than once proceeded.[3] But aside from such extreme cases, it is only necessary to call to mind the law in connection with any of our famous statutes to see what the process of definition and application really means. Take the mass of cases bearing on the simple-looking words "in the presence of" in the Statute of Wills, or a "promise to answer for the debt or default of another" in the Statute of Frauds, the learning brought to bear on the subject, the subsidiary rules which have grown up to determine whether a witness is in the presence of the testator, or whether a promise is one of suretyship. Take the dozen lines of the Statute of Frauds, section 17, a redraft of which by learned persons[4] takes the form of fourteen propositions, any one of them longer than the original section. Or as an extreme illustration, take the rules which have grown out of the decisions of our Supreme Court (when expounding that law *for* the legislature which in this country is the only "command of the sovereign" in a literal sense), on the clause of the Constitution which gives Congress power to regulate interstate and foreign commerce.

(b) This necessary growth of statute as well as common law by its application has an importance far beyond what might appear at first sight. This is because of its bearing on the codification question. Bentham, as we have seen, dealt with this question as a choice between the law of a code on the one hand and judge-

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[1] Riggs *v.* Palmer, 115 N. Y. 506; Shellenberger *v.* Ransom, 47 N. W. Rep. 700 (Neb. 1891). But see 4 Harv. L. Rev. 394.

[2] A Generation of Judges, by their Reporter, 87.

[3] See, for example, Avery *v.* Latimer, 14 Ohio, 542, where, in a collision between custom and a statute, the court gave the right of way to the former, saying: "It would hardly be consistent or proper for us to change it [the custom] because it does not exactly accord with our ideas of a proper construction of the statute."

[4] 1 Law Quarterly Rev. 1.

made law on the other, and his example has often been followed. The assumption is constantly made that the question of this essay is only another statement of the question of codification. In truth, that assumption is highly misleading, and has caused much confusion. The growth which we have seen in the application of statute law would necessarily appear in a code, so long as our present methods and judicial machinery continue: and the limited field of operations to which it is confined in dealing with a single statute would be considerably extended by the effort to give statutory expression to the whole law. There would, in the first place, be the entirely new cases, which, as Lord Abinger said, must in any system be left to the good sense of the judges. But these would be a comparatively slight matter. Much more important would be the past which lay behind the code. It has been shown, in an interesting article on Statutory Revision,[1] how futile is the attempt in the statute law to wipe off the slate and start afresh — how the history of a statute has so important a bearing on its construction that, once passed, it "is as ineradicable as a sin." Much more would this be true of a codification of the whole common law. Just as phrases of the legislature which seem the plainest are daily receiving from courts a construction of which no one unacquainted with the history of the common law would have dreamed,[2] so no code, however skilfully drawn,[3] could prevent a constant recourse to the sources from which it was constructed. That branch of our law which is always codified, the law of the Constitution, shows plainly enough what a code leaves to the hand of its expounders. The fact that judicial legislation cannot be cut off by a code, however its form and scope may be affected, is expressly admitted by some of the most learned advocates of codification at the present time,[4] one of whom, in an interesting scheme for constructing a code, suggests a method for the periodical absorption of the judge-made law.[5] A clear understanding of this fact, that codification and judicial legislation depend on differ-

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[1] Mr. Chaplin in 3 Harv. L. Rev. 73.

[2] As when in Soltau *v.* Gerdau, 119 N. Y. 380, a technical doctrine of the law of larceny was brought in to modify the word "intrusted" in a factor's act.

[3] The difficulty of the task is pointed out by a distinguished advocate of codification when he says that "the *technical* part of legislation is incomparably more difficult than what may be styled the *ethical*." (2 Austin's Jurisprudence, 4th ed., 683.)

[4] Maine, Village Communities, 367; T. E. Holland in 126 Edin. Rev. 347.

[5] 126 Edin. Rev. 347.

ent considerations, is of the first importance. The confusion of the two questions prevents a proper statement of either; their separation does much to clear up both.

The question of codification is not for us; but there is one feature of it which should be referred to at this point. Nothing in the battle for codification, which has been fought on so many fields for a century, is more noticeable than the extreme to which each party goes. A code is represented on the one side as a cure for "the law's delay" and all its evils, and on the other as a chimerical undertaking, impossible in the nature of things. Much of this difference of opinion is explained by a true understanding of the process of applying the law to facts. For one who like Bentham[1] took no account of the difficulties of analyzing and classifying facts, and ignored the process of reasoning which lies, as it were, between any law and its application, there could be but one answer to the codification question. A code would settle everything, and lawsuits, except so far as they turned on mere disputed facts, might be done away with. Modern codifiers, to be sure, do not rely so much on the ancient argument that a code would make every man his own lawyer; but it is the logic of events which has accomplished this. From Bentham's premises the conclusion ought to follow; the only trouble was that he thought only of the rule and overlooked its application.

Some of his opponents, on the other hand, lay hold of what may be called the *fact end* of the process, the end which is especially emphasized by common-law methods, and forget the rule. They therefore designate codification as an attempt to anticipate every possible state of facts and thus win an easy victory over it. Yet intelligent codification has no such aim; it seeks only to cast the existing rules of law in another form. Mr. Carter, as we have seen, seems especially open to this charge of considering only the facts on the one hand and the source of law on the other, and of squeezing out, so to speak, the *tertium quid*, the rule itself, which lies between. As when he likens the judge to the referee of an athletic contest, each being, as he says, an expert chosen to declare the customs of the game. The illustration is an unfortunate one; for whatever may be true of the judge, nothing could be more untrue of the referee. In any form of athletic sports which is at all developed, the customs of the game

[1] See page 193, *supra*.

are fixed with absolute rigidity. So far as it becomes desirable to change them, they are changed from time to time by persons in authority. In a whole season of professional base-ball there are few cases in which the least doubt arises as to these rules, and such cases are decided by the umpire merely because he is the most convenient person to appeal to. So far as these rare disputes go the umpire might be dispensed with altogether. The players could easily reserve the point for the higher board which in any event ultimately decides it, and continue the game. The real duty of the umpire is to decide pure questions of fact,—whether A or B first reached a certain point, whether the ball was caught or dropped, etc. He is a jury, not a judge. If he were a judge, and if the illustration were apt, it would be fatal to Mr. Carter's argument, for base-ball, football, and prize-fighting are instances of perfect and successful codification. The conditions of the game make a code possible, and indeed necessary.

IV. From the considerations into which we have gone certain conclusions may be drawn in regard to the question of this essay.

1. Judicial legislation is a necessary element in the development of the common law. This is a consequence, in the first place, of our judicial machinery and our mode of treating previous decisions; and secondly, and especially, of the shape in which facts present themselves. In the reasoning process by which the various combinations of facts are analyzed and the law applied to them, there is necessarily growth and development, and this occurs also to some extent in statute law.

2. The extent to which this judicial legislation should properly go is a question on which precise rules cannot be laid down. An attempt to formulate such a rule has, to be sure, been recently made by high authority. In Cochrane *v.* Moore, 25 Q. B. D. 57, Lord Esher, in holding that the parol gift of a chattel *inter vivos* required delivery, drew a distinction between "fundamental propositions of law," which could be changed only by Parliament, and the "evidence of the existence of such a proposition," which was within the disposition of the court. But no test was suggested by the Master of the Rolls for making this discrimination, and his application of it to the case before him is the best criticism upon it. It is impossible to see in what sense delivery is "part of the proposition of law which constitutes a gift," yet merely evidence of a similar proposition in the case of a sale. In truth no

such absolute demarcation is possible in a question depending on such varied circumstances. It is the duty of the judge to apply the law to such facts as come before him. He must perform his office with wisdom and justice, guided by a method of reasoning which the practice of English courts for centuries has made familiar. So far as this process, carried out as his predecessors have done before him, results in legislation, such legislation is legitimate and necessary. No more precise rule can be laid down to meet all cases.

3. How far may the judge in carrying on this process undertake to discard old doctrines and substitute new ones as society appears to require it? Here again no absolute rule can be laid down. It may happen that a change of customs makes a change in the law so plainly necessary that it is mere good sense for the court to give effect to it, as was done, for example, in a branch of the law depending preëminently upon custom, by the American decisions which recognized the negotiability of bonds.[1] In general the maxim *cessante ratione cessat ipsa lex* might well have been given a far wider application. The history of our law shows repeated instances where courts have failed, through an unreasoning conservatism, to cut away technicalities utterly meaningless and having their origin in conceptions long since passed away; and the law as a science has suffered accordingly. A certain amount of judicial legislation of this kind might properly be regarded as incidental to the mere wise and just *administration* of the law. But no such step should be taken without great caution and a knowledge of all its bearings. The proper tendency for modern courts is not to be found by considering the acts of great judges in the past, whatever their services to the law, who were acting under other surroundings and influences; it depends on the conditions of our own time. We live under a government where access to the legislature is easy. Since the abolition of the old forms of action legal reasoning, formerly confined, as it were, to so many separate circles, is carried on in one broad field. In our twofold system of law and equity we have a body of rules and principles which, properly understood, can do much; and the true means to the more perfect development of this system does not

[1] See White *v.* R. R. Co., 21 How. 575. In England a similar result is apparently reached by the more indirect method of estoppel. See *In re* Romford Canal Co., 24 Ch. D. 85.

lie in the judicial temper which relies on its own conceptions of justice and expediency as a substitute for the wisdom of the past. It is to no such habit of mind that we owe our inherited body of law, and it would be unfit to trust to this means for its reform. It is "wiser," in the words of an eminent judge,[1] "to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and if you go beyond this you strain and weaken it, and attain but imperfect and unsatisfactory, and often only unjust, results." The need of the present time lies in a true critical and historical understanding of the principles of our law, which shall make clear alike its exact scope, its merits, and its defects, and thus point the way to a legislative cure of the latter. Even when a reform seems most plainly desirable, the conditions under which the judge works often make it preferable that the change should come from the legislature.[2] One step by the court unless followed up can cause nothing but confusion; and the fact that the actual decision alone is binding makes it often doubtful how far a later court will continue the course upon which its predecessor has entered. Whether such a course should be begun depends on all the circumstances of the case. The only sure guides are common sense, and a knowledge of the law which is founded upon a knowledge of its history.

Ezra R. Thayer.

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[1] Coleridge, J., in 2 E. & B. 269.

[2] Amory *v.* Meredith, 7 Allen, 397, may perhaps furnish such an instance of a desirable result attained by a less desirable method. See also Sugden *v.* St. Leonards, 1 Prob. Div. 154, 244–5, 240–2, where the majority of the court proceeded on a "principle" which if enacted by the legislature would have gone far to overthrow the whole hearsay rule, yet which was probably not so intended by the court.

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